

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

CALVIN K. TICESON,

Plaintiff,

v.

JOSEPH LEHMAN,

Defendant.

Case No. C05-5007RBL

REPORT AND  
RECOMMENDATION

**NOTED FOR:  
APRIL 14<sup>TH</sup>, 2006**

This Civil Rights action has been referred to the undersigned Magistrate Judge pursuant to Title 28 U.S.C. § 636(b)(1)(B). Plaintiff contends he had a liberty interest in release on his earned early release date and was entitled to due process prior to a decision not to release him. Before the court is defendants' motion for summary judgement. (Dkt. # 16). Plaintiff has not responded. Under Local Rule 7 (b)(2) failure to file papers in opposition to a motion may be deemed by the court as an admission the motion has merit.

The named defendants are Joseph Lehman, former Secretary of the Department of Corrections, Victoria Roberts, Chair of the End of Sentence Review Committee, and Kimberly Acker, Civil Commitment Program Manager. (Dkt. # 8).

## FACTS

Plaintiff has not contradicted defendants facts which are adopted as follows:

Calvin Ticeson was previously in the custody of the Washington State DOC pursuant to a guilty plea of unlawful imprisonment and felony harassment on November 17, 1998. Exhibit 1, Declaration of Virginia Shamberg, Attachment A, Judgment and Sentence, State v. Ticeson, King County Superior Court Cause No. 98-1-03617-2-SEA. A special verdict/finding was rendered that the defendant committed the crime(s) with a sexual motivation for the unlawful imprisonment. Id. As a result of his conviction, Mr. Ticeson received a sentence of 60 months and 29 months confinement. The trial court also imposed a community custody requirement for the maximum time period allowed by law. Id. at 3.

In 1998, the year in which Mr. Ticeson was sentenced by the King County Superior Court to his term of community placement, a standard condition of community placement included the requirement that the residence location and living arrangements of Mr. Ticeson as a sex offender would be subject to the prior approval of the DOC during the period of community placement in his case.

Mr. Ticeson's ERD was November 16, 2001. Exhibit 2, Declaration of Cherrie S. Kollmer, Attachment A, Legal Face Sheet. Mr Ticeson sentence expired April 3, 2003. Id. Mr. Ticeson was released from DOC custody on April 3, 2003. Id.; see also Exhibit 3, Declaration of Stefanie J. Weigand, Attachment A, Deposition Transcript of Calvin Ticeson Page 10 Line 10. Mr. Ticeson was released to the King County Sheriff after being served with paperwork showing probable cause that he was a sexually violent predator. Dep. Transcript 10: 23-25. Mr. Ticeson is currently a resident at the Special Commitment Center, a Department of Social and Health Services facility on McNeil Island. Dep. Transcript 5: 14-16.

Inmates who have a community custody requirement in their judgment and sentence and are required by law or their judgment and sentence to have a release plan approved by DOC, may be released to community custody on or after their ERD only if their release plan is approved by DOC and the statutory notification requirements for the release of such offenders are satisfied. Exhibit 4, Declaration of Kit Bail at ¶ 9. Under DOC policy 350.200, an inmate's transition into the community on community custody status is premised on the inmate submitting a proposed release plan, including a proposed release address, which does not violate the conditions of the inmate's judgment and sentence, does not place the inmate at risk to re-offend, and does not present a risk to victim safety or community safety. Id. at ¶ 11. See also Exhibit 4, Attachment A, DOC Policy 350.200.

The process for an inmate to secure DOC approval of a release plan in order to be released to community custody is contained in DOC Policy 350.200. Id. at ¶ 10. DOC policy 350.200 is available to all inmates. Exhibit 4, Attachment A. The policy reads in part: "Staff shall not complete or forward a TP [transition plan] for investigation if the ESRC has determined that the offender meets the criteria for referral as a sexually violent predator under RCW 71.09." Exhibit 4, Attachment A, at 8. This portion of the policy was promptly changed after the Washington State Dutcher decision with a memo entitled Dutcher Decision. Exhibit 4, Attachment B, Dutcher Decision Memo dated February 13, 2003.

Proposed release plans for possible transfer to community custody status for sex

1 offenders are investigated by a Classification Counselor or Community Corrections  
 2 Officer (CCO) to determine if the plan is viable. Exhibit 5, Declaration of Kimberly  
 3 Acker at ¶ 7. Minimum requirements include: an actual location of a physical address,  
 4 not a contact address or post office box; the occupant/owner of the property is knowingly  
 5 allowing the sex offender to reside there; the sex offender intends to physically reside in  
 6 the residence; and the placement does not put the offender in violation of his/her  
 7 conditions of release. Id. The proposed sponsor shall be informed of the offender's  
 8 criminal history, sex offender notification level and community notification, and  
 9 conditions of release. Id. The Classification Counselor or CCO will investigate. Id. A  
 10 release plan will be denied if the classification Counselor or CCO determines that the  
 11 plan will place the offender in circumstances where there is a likely risk to reoffend. Id.  
 12 The CCO will assess the degree of risk for victims and potential victims of similar age or  
 13 circumstances when investigating the proposed release plans for sex offenders. Id. See  
 14 also Exhibit 4, Attachment A, at 10-11; Exhibit 4, Attachment B.

15 DOC staff investigate the inmate's release plan by visiting the proposed residence  
 16 and by interviewing the person or persons with whom the inmate proposes to reside.  
 17 Exhibit 4, ¶ 12. The investigating DOC staff then decide whether to approve or deny the  
 18 inmate's release plan and communicate that decision to the inmate's counselor. Id.

19 If an inmate's release plan is denied, inmates are advised of DOC's decisions  
 20 regarding release plans. Id. at ¶ 13. The inmate may then submit a new or revised plan for  
 21 DOC's review. Id. at ¶ 14. If the inmate is ultimately unable to locate a viable release  
 22 address or all of the inmate's proposed plans for possible transfer to community custody  
 23 status are denied, he/she shall be released on the date his/her maximum sentence is  
 24 reached. Id. Counselors continue working with inmates up to their maximum release date  
 25 encouraging inmates to find the best possible place for them to go, even though once  
 26 inmates have reached their maximum release date, they must be released from DOC  
 27 custody without regard to their plan. Id.

28 According to the Plaintiff's deposition testimony, he submitted a release plan to  
 his brother's house, which was denied. Dep. Transcript 15: lines 7-20. Plaintiff also states  
 that he submitted a release plan to his mother's home, which was denied. Dep. Transcript  
 17: 6-25. On or about June 6, 2001 Risk Management Specialist Beverly Farris met with  
 Mr. Ticeson and his Counselor, Joe Gillis, for a risk management meeting. Exhibit 6,  
 Declaration of Beverly Farris at ¶3. Counselor Gillis discussed his contact with Mr.  
 Ticeson's mother, Betty Glover, who indicated that she would provide some assistance  
 when it came to release planning, but was limited as to what she could do. Ms. Farris  
 recalls that Ms. Glover indicated she did not want Mr. Ticeson to come live with her. Id.  
See also Exhibit 7, Declaration of Sue Lay, Attachment A, May 7, 2001 chrono entry by  
 J. Gillis; Exhibit 7, Attachment B, June 6, 2001 chrono by J. Gillis. Those were the only  
 two plans the Plaintiff submitted. Dep. Transcript 18: 1-15. See also Exhibit 7,  
 Attachment C, August 30, 2002 chrono entry by R. Jackson.

(Dkt. # 16, pages 2 to 5).

Washington State's complex sentencing system allows some inmates to  
 earn time off their sentence by programing and good behavior while incarcerated. Other inmates, like  
 Mr. Ticeson, may not earn time off their sentences but instead may become eligible for placement in a  
 community under supervision in lieu of earning good time or earned time.

REPORT AND RECOMMENDATION 3

1 RCW 9.94A.728 (2) provides:

2 No person serving a sentence imposed pursuant to this chapter and committed to the  
3 custody of the department shall leave the confines of the correctional facility or be  
4 released prior to the expiration of the sentence except as follows:

...

5 (2)(a) A person convicted of a sex offense or an offense categorized as a serious violent  
6 offense, assault in the second degree, vehicular homicide, vehicular assault, assault of a  
7 child in the second degree, any crime against persons where it is determined in  
8 accordance with RCW 9.94A.602 that the offender or an accomplice was armed with a  
9 deadly weapon at the time of commission, or any felony offense under chapter 69.50 or  
10 69.52 RCW, committed before July 1, 2000, may become eligible, in accordance with a  
11 program developed by the department, for transfer to community custody status in lieu of  
12 earned release time pursuant to subsection (1) of this section;

13 (b) A person convicted of a sex offense, a violent offense, any crime against persons  
14 under RCW 9.94A.411(2), or a felony offense under chapter 69.50 or 69.52 RCW,  
15 committed on or after July 1, 2000, may become eligible, in accordance with a program  
16 developed by the department, for transfer to community custody status in lieu of earned  
17 release time pursuant to subsection (1) of this section;

18 (c) The department shall, as a part of its program for release to the community in lieu of  
19 earned release, require the offender to propose a release plan that includes an approved  
20 residence and living arrangement. All offenders with community placement or  
21 community custody terms eligible for release to community custody status in lieu of  
22 earned release shall provide an approved residence and living arrangement prior to  
23 release to the community;

24 (d) The department may deny transfer to community custody status in lieu of earned  
25 release time pursuant to subsection (1) of this section if the department determines an  
26 offender's release plan, including proposed residence location and living arrangements,  
27 may violate the conditions of the sentence or conditions of supervision, place the  
28 offender at risk to violate the conditions of the sentence, place the offender at risk to  
reoffend, or present a risk to victim safety or community safety. The department's  
authority under this section is independent of any court-ordered condition of sentence or  
statutory provision regarding conditions for community custody or community  
placement;

When an inmate is first transferred to the Department of Corrections, staff at the Department  
calculate at least three possible release dates for the inmate. The first of these dates is the maximum  
release date. A maximum release date is the date an inmate will be released because they have served the  
entire sentence imposed. The second date is an earned early release date, ERD. This is the date an  
inmate may be released if they earn all available sentence reductions and do not lose earned time for  
misbehavior. Release on this date is not automatic for all inmates. The third date the department  
calculates is an adjusted release date. This is the projected date when an inmate may be eligible for

1 release if they lose no further good time or earned time. This date along with the earned early release  
2 date changes when an inmate does not earn or loses a possible reduction in their sentence. By statute an  
3 inmate cannot receive earned early release credits before they have been earned. "The correctional  
4 agency shall not credit the offender with earned release credits in advance of the offender actually  
5 earning the credits." See, RCW 9.94A.728 (1).

6 Certain classes of inmates have periods of supervision at the end of their incarceration. These  
7 inmates are not allowed to earn earned early release because of the nature of their crime. These inmates  
8 receive supervision by way of community placement or community custody "in lieu of" earned early  
9 release. Plaintiff is a person whose Judgment and Sentence included community placement or  
10 community custody following release. Defendants contends plaintiff was not entitled to general release  
11 on his earned early release date. Plaintiff has not come forward with any evidence to contradict this  
12 assertion. Thus, this action deals with an inmate who reached his earned early release date and was not  
13 released on that date because community custody or community placement was imposed in the  
14 Judgment and Sentence.

### 15 DISCUSSION

#### 16 A. The standard of review.

17 Pursuant to Fed. R. Civ. P. 56 (c), the court may grant summary judgment "if the pleadings,  
18 depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that  
19 there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of  
20 law." Fed. R. Civ. P. 56 (c). The moving party is entitled to judgment as a matter of law when the  
21 nonmoving party fails to make a sufficient showing on an essential element of a claim on which the  
22 nonmoving party has the burden of proof. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1985).

23 There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a  
24 rational trier of fact to find for the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,  
25 475 U.S. 574, 586 (1986)(nonmoving party must present specific, significant probative evidence, not  
26 simply "some metaphysical doubt."). See also Fed. R. Civ. P. 56 (e). Conversely, a genuine dispute  
27 over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring

1 a judge or jury to resolve the differing versions of the truth. Anderson v. Liberty Lobby, Inc., 477 U.S.  
2 242, 253 (1986); T. W. Elec. Service Inc. v. Pacific Electrical Contractors Association, 809 F.2d 626,  
3 630 (9th Cir. 1987).

4 The determination of the existence of a material fact is often a close question. The court must  
5 consider the substantive evidentiary burden that the nonmoving party must meet at trial, e.g. the  
6 preponderance of the evidence in most civil cases. Anderson, 477 U.S. at 254; T.W. Elec. Service Inc.,  
7 809 F.2d at 630. The court must resolve any factual dispute or controversy in favor of the nonmoving  
8 party only when the facts specifically attested by the party contradicts facts specifically attested by the  
9 moving party. Id.

10 The nonmoving party may not merely state that it will discredit the moving party's evidence at  
11 trial, in hopes that evidence can be developed at trial to support the claim. T.W. Elec. Service Inc., 809  
12 F.2d at 630.(relying on Anderson, supra). Conclusory, nonspecific statements in affidavits are not  
13 sufficient, and "missing facts" will not be "presumed." Lujan v. National Wildlife Federation, 497 U.S.  
14 871, 888-89 (1990).

15 B. Analysis.

16 The court begins by noting that an inmate has no constitutional right to release before expiration  
17 of the sentence. Greenholtz v. Inmates of Nebraska, 442 U.S. 1 (1979). Nor have the Washington state  
18 appellate courts recognized an independent state created interest in amassing early release credits. In Re  
19 Galvez, 79 Wash. App. 655 (1995). This does not end the court's analysis because in this case the court  
20 is not concerned with the granting or denial of earned early release time. Under the facts of this case the  
21 plaintiff had been granted the credits or time off his sentence and was eligible for release, subject to the  
22 approval of the release plan by the Department of Corrections and whatever public notification may be  
23 mandated by state law. The court must consider whether the Due Process Clause of the 14<sup>th</sup> Amendment  
24 requires a hearing prior to denial of a release plan.

25 The court cannot overemphasize that the interest at issue in this case must be a state created  
26 liberty interest and is not an interest found under the 14<sup>th</sup> Amendment Due Process Clause itself.  
27 Normally the court would first determine whether there is in fact a state created liberty interest. The

1 Washington State Court of Appeals found there to be a “limited liberty interest” in Crowder, but the  
2 court did not define what a “limited liberty interest” is and approved post deprivation remedies which  
3 only included the Department helping Mr. Crowder to formulate a plan. In Re Crowder, 97 Wash App.  
4 598 (1999). No hearing of any type was ordered.

5 In Dutcher the same court emphasized it was operating under the State Rule of Appellate  
6 Procedure 16.4 which did not require a finding of a constitutional violation and only required a finding  
7 of unlawful restraint under state law. Dutcher 114 Wash. App. at FN 3 and 4; Citing In Re Cashaw, 123  
8 Wash. 2d 138 (1994). Cashaw specifically rejected the contention that procedural rules which are not  
9 outcome determinative create a liberty interest protected by due process. In Re Cashaw, 123 Wn 2d. at  
10 146. In Cashaw the Washington State Supreme Court required the Indeterminate Sentence Review  
11 Board to follow its own rules and granted relief using the State Rule of Appellate Procedure 16.4. This  
12 grant of relief was not based on a finding of any constitutional violation.

13 The Washington State Supreme Court in Cashaw was careful to grant relief only on state  
14 grounds. Indeed, the State Supreme Court in Cashaw analyzed what is needed to find a state created  
15 liberty interest and found no due process violation in that case. The State Supreme Court’s analysis in  
16 Cashaw is instructive regarding what constitutes a liberty interest and when such interests rise to the level  
17 of a state created liberty interest protected by the Due Process Clause of the United States Constitution.  
18 This court adopts the analysis set forth by the Washington State Supreme Court. The court stated:

19 Liberty interests may arise from either of two sources, the due process clause and  
20 state laws. Hewitt v. Helms, 459 U.S. 460, 466, 103 S.Ct. 864, 868, 74 L.Ed.2d 675  
21 (1983); Toussaint v. McCarthy, 801 F.2d 1080, 1089 (9th Cir.1986), cert. denied, 481  
22 U.S. 1069, 107 S.Ct. 2462, 95 L.Ed.2d 871 (1987). The due process clause of the federal  
23 constitution does not, of its own force, create a liberty interest under the facts of this case  
24 for it is well settled that an inmate does not have a liberty interest in being released prior  
25 to serving the full maximum sentence. Greenholtz v. Inmates of Nebraska Penal &  
26 Correctional Complex, 442 U.S. 1, 7, 99 S.Ct. 2100, 2103, 60 L.Ed.2d 668 (1979);  
27 Ayers, 105 Wash.2d at 164-66, 713 P.2d 88; Powell, 117 Wash.2d at 202-03, 814 P.2d  
28 635.

29 However, as indicated above, state statutes or regulations can create due process  
30 liberty interests where none would have otherwise existed. See Hewitt, 459 U.S. at 469,  
31 103 S.Ct. at 870; Toussaint, 801 F.2d at 1089; Powell, 117 Wash.2d at 202-03, 814 P.2d  
32 635. By enacting a law that places substantive limits on official decisionmaking, the State  
33 can create an expectation that the law will be followed, and this expectation can rise to  
34 the level of a protected liberty interest. See Toussaint, 801 F.2d at 1094.



For a state law to create a liberty interest, it must contain "substantive predicates" to the exercise of discretion and **"specific directives to the decisionmaker that if the regulations' substantive predicates are present, a particular outcome must follow"**. Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 463, 109 S.Ct. 1904, 1910, 104 L.Ed.2d 506 (1989); Swenson v. Trickey, 995 F.2d 132, 134 (8th Cir.), cert. denied, 510 U.S. 999, 114 S.Ct. 568, 126 L.Ed.2d 468 (1993). **Thus, laws that dictate particular decisions given particular facts can create liberty interests, but laws granting a significant degree of discretion cannot.**

In Re Cashaw, 123 Wn 2d at 144 (emphasis added).

The Department has been mandated by statute to implement a system that allows for the possibility of early release. For some persons the release is automatic when they reach their earned early release date because they have no supervision following incarceration. Inmates like Mr. Ticeson, facing community placement or community custody, can earn a potential reduction in sentence and be placed on community placement or community custody at the discretion of the Department of Corrections.

The parties may disagree whether the discretion of the Department is unfettered or restricted with regards to what the department may consider but such argument misses the point. RCW 9.94A.728(2)(d) grants the Department the ability and the discretion to deny a release plan for any person who would receive community custody if the Department determines the plan may violate conditions of a sentence or supervision, may place the offender at risk to reoffend, or presents a risk to victim or community safety. Thus, whatever limits have been placed on the Department are not outcome determinative and there is no state created liberty interest. The Department still has a significant degree of discretion in granting or denying release to community placement or community custody. As the statute itself notes "[t]he department's authority under this section is independent of any court-ordered condition of sentence or statutory provision regarding conditions for community custody or community placement." RCW 9.94A.728 (2)(d).

A careful reading of the Washington State Court of Appeals holding in Dutcher shows the court was acting pursuant to state Rule of Appellate Procedure 16.4 and was using the lesser standard of review which did not require a finding of a constitutional violation. The ruling in Dutcher that the Department must follow the state statutory system and consider plans on the merits does not equate to a finding of a state created liberty interest in release and the holding in Dutcher did not eliminate the



1 Departments discretion.

2       There has been a progression in the State Court of Appeals decisions in which their terminology  
3 and reasoning was expanding. In Crowder the court found only a “limited liberty interest.” In Re  
4 Crowder, 97 Wash. App. 598 (1999). In Dutcher, the court used the reasoning of Cashaw to grant relief  
5 solely on state grounds but inaccurately stated the interest was a “limited but protected liberty interest.”  
6 Dutcher, 114 Wash. App. at 758. Now, in a more recent case, the same court is citing Cashaw and  
7 Dutcher for the proposition that there is a limited liberty interest protected by due process. In Re Liptrap,  
8 127 Wash. App. 463, 469 (2005). To the extent that Liptrap, finds a state created liberty interest in  
9 release credits for persons subject to community custody the cases cited do not support the proposition  
10 and the court declines to follow this decision. A potential for release based on the Department exercising  
11 its discretion does not equate to an absolute interest in release that a person with earned time and no post  
12 release supervision enjoys.

13       As noted above neither Crowder nor Dutcher found a state created liberty interest. Under the  
14 analysis set forth in Cashaw there is no federally protected interest in this case. The holding of Dutcher  
15 is that an agency follow its own rules and statutes. While in some cases that may become outcome  
16 determinative and raise to the level of a state created liberty interest it is not outcome determinative in  
17 this case because of the amount of discretion left with the Department.

18       There is not a state created liberty interest at stake in this case. The statutes creating the potential  
19 of community custody do not set forth any mandate that the Department hold hearings and only mandate  
20 the Department consider properly submitted release plans for persons who have reached their possible  
21 earned early release date subject to community custody or community placement after release. Here  
22 plaintiff submitted two plans and both were denied. Accordingly the defendant’s motion for summary  
23 judgment should be **GRANTED**.

#### 24 CONCLUSION

25       For the reasons stated above the court should **GRANT** defendant’s motion for Summary  
26 Judgment. A proposed order accompanies this Report and Recommendation.

27       Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal rules of Civil Procedure, the  
28 **REPORT AND RECOMMENDATION 9**

1 parties shall have ten (10) days from service of this Report to file written objections. *See also* Fed.  
2 R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of  
3 appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule  
4 72(b), the clerk is directed to set the matter for consideration on **April 14<sup>th</sup>, 2006**, as noted in the  
5 caption.

6  
7 DATED this 17<sup>th</sup> day of March, 2006.

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12 Karen L. Strombom  
13 United States Magistrate Judge  
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